85-732

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; and OZARK AIR LINES, INC.,
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court Of the State of South Dakota

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Section 7(d) of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513(d)) forbids a state to assess or tax air carrier transportation property at ratios or rates higher than those imposed on other "commercial and industrial property of the same type." The Act defines "commercial and industrial property" to include property "devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. § 1513(d)(2)(D). Does this definition permit a state to escape § 1513(d)'s prohibition by wholly exempting business property from taxation, while simultaneously imposing a tax on air carrier transportation property?

PARTIES TO THE PROCEEDING

Appendix E-1, *infra,* 24a, lists the parties below. Plaintiffs included, in addition to the appellants here, Continental Airlines Corporation. The names of individual defendants, all of whom were sued only in their capacities as state or county officials, are not listed.

STATEMENT OF CORPORATE AFFILIATIONS

Parent companies, less than wholly owned subsidiaries, and affiliates of any of the appellant airlines are:

(a) Ozark Air Lines, Inc., is wholly owned by Ozark Holdings, Inc.

(b) Frontier Airlines, Inc., is wholly owned by Frontier Holdings, Inc., whose corporate parents are RKO Enterprises of Ohio, Inc., RKO Enterprises, Inc., and GenCorp, Inc., and whose subsidiaries are Frontier Horizon, Frontier Services Company, Frontier Development Group, Inc., Leasco, Inc., and Colorado Aerotech, Inc. In addition, Peoples Express Airlines recently has agreed to buy Frontier Holdings, Inc.

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OPINIONS BELOW

The opinion of the Supreme Court of South Dakota (App. A, *infra*, 1a) is reported at 372 N.W. 2d 106 (1985). The decision of the Circuit Court for the Sixth Judicial Circuit of South Dakota (App. B., *infra*, 13a) is unreported.

JURISDICTION

The judgment of the Supreme Court of South Dakota (App. C, *infra*, 22a), sustaining the validity of the South Dakota Airline Flight Property Tax (S.D. Codified Laws Ch. 10-29) against a challenge based on the Constitution (U.S. Const. art. VI, cl.2) and laws (49 U.S.C. § 1513(d)) of the United States, was entered on July 31, 1985. The notice of

appeal (App. D, *infra,* 23a) was filed with the South Dakota Supreme Court on October 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Appendix E-3, *infra,* 27a, sets forth pertinent portions of the following:

A. Section 7(d) of the Airport Development Acceleration Act of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 1513(d).

B. South Dakota Codified Laws, Sections 10-4-6.1; 10-6-33; 10-6-34.1; 10-29-8.

C. U.S. Const. art. VI, cl.2 (the Supremacy Clause).

STATEMENT OF THE CASE

In the proceedings below, four interstate air carriers providing commercial service to airports in South Dakota challenged as violative of federal law taxes imposed upon their property by the State of South Dakota for the years 1982 and 1983. Their challenge ultimately was rejected by the South Dakota Supreme Court and this appeal followed.

1. Operation Of South Dakota's Airline Flight Property Tax

In 1961 South Dakota imposed upon airlines serving South Dakota a centrally assessed property tax, *i.e.,* assessed by the State's Department of Revenue, rather than by local county or city taxing authorities. 1961 S.D. Sess. Laws Ch. 449, S.D. Codified Laws §§ 10-29-2, -8. Each aircraft used in South Dakota was valued at a percentage of its total value, the percentage being determined by the proportion of the airline's total operations (measured by flight time, revenue ton miles, and tonnage of passengers and freight received and discharged) conducted within the State. S.D. Codified Laws § 10-29-10. The aircraft so valued were then assessed at up to 60%

and taxed at the average mill rate paid on all property, both real and personal, within the State. S.D. Codified Laws §§ 10-6-33, -34.1; -29-14. Appeals from the department's assessment were to be taken first to the State Board of Equalization and then to a state circuit court. S.D. Codified Laws §§ 10-29-11, -11-43. The taxes so determined were allocated for collection to each county containing an airport served by the airline, and were to be used exclusively for such airports. S.D. Codified Laws § 10-29-15.

When the airline flight property tax was enacted in 1961, South Dakota also taxed other business-related personal property. But this tax was repealed in 1978. After that date all personal property that was not centrally assessed was classified for ad valorem tax purposes and was exempted from taxation. S.D. Codified Laws § 10-4-6.1. Central assessment—and thus taxation—was retained for property of public service companies, such as airlines, railroads, telephone and telegraph companies, electric utilities, and pipeline companies.[1]

2. Origin of the Federal-State Conflict

In 1982 the Congress determined that several specified taxing practices of the states "unreasonably burdened and discriminated against interstate commerce," and amended the Airport Development Acceleration Act of 1973 to forbid such practices. 49 U.S.C. 1513(d).[2] This 1982 amendment prohibited a state from assessing air carrier transportation property at a higher proportion of market value than the assessment ratio applied to "other commercial and industrial property of the same type," or from levying or collecting a tax based on such a discriminatory assessment. The states also were forbidden to levy or collect an ad valorem property tax at a rate exceeding the tax rate applied to other commercial and industrial property of the same type. 49 U.S.C. § 1513(d)(1); App. E-3, *infra,* 27a.

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[1] S.D. Codified Laws §§ 10-6-34.1, -29-2, -28-1, -33-10, -34-8, -35-2, -37-9.

[2] This amendment, adding Subsection (d) to Section 7 of the Airport Development Acceleration Act, was enacted as § 532 of the Airport and Airway Improvement Act of 1982. Pub. L. No. 97-248, 96 Stat. 671, 701.

3. Proceedings Below

Based on this new federal statute, four airlines—Western, Republic, Ozark and Frontier—applied for abatement and refund of property taxes paid to South Dakota for the year 1982. App. B, *infra,* 13a. Soon thereafter the same airlines challenged the assessment made against their property for 1983 by the State Board of Equalization. *Id.* at 13a-14a.[3] The airlines contended that South Dakota's airline flight property tax violated 49 U.S.C. § 1513(d) because the state statute assessed and taxed their personal property, while most other commercial and industrial property in the state was wholly exempt from taxation. *Id.* at 18a.

The 30 refund suits for 1982 and the 12 appeals from the board of equalization for 1983 all were consolidated for hearing by the Circuit Court for the Sixth Judicial Circuit in Hughes County, South Dakota. *Id.* at 14a. In April 1984 the circuit court issued a single opinion and judgment disposing of all 42 cases. App. B, *infra,* 13a.

The circuit court believed itself "not required to delve into the issue of whether this tax is burdensome or discriminatory." *Id.* at 21a. Instead the circuit court sustained the state's tax as an "in lieu" tax specifically permitted under the federal statute. *Id.* at 20a.[4]

On appeal a divided South Dakota Supreme Court affirmed the judgment, but on a different basis. *Western Airlines, Inc. v. Hughes County,* 372 N.W. 2d 106 (S.D. 1985); App. A, *Infra,* 1a. The court unanimously held that the circuit court had erred in sustaining the airline flight property tax as an "in lieu" tax. 372 N.W. 2d at 109, 111; App. A. *infra,* at 6a, 9a. While not denying the tax's discriminatory effect, the supreme court nonetheless upheld the tax on a theory that neither was raised by the State in its answer to the various complaints nor considered by the trial court.

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[3] The State in 1983 imposed on the four appellant airlines property taxes totalling $179,303. App. E-2, *infra,* 26a. Continental Airlines was a party in the court below, but has not joined in this appeal.

[4] Section 1513(d)(3) specifically permits a state to impose upon an air carrier "any in lieu tax which is wholly used for airport and aeronautical purposes." App. E-3, *infra,* 28a.

Section 1513(d)(2)(D) defines "commercial and industrial property" as property "devoted to commercial or industrial use *and subject to a property tax levy*" (emphasis added). Since noncentrally assessed business property was exempt from taxation (S.D. Codified Laws § 10-4-6.1), the court reasoned that this property was not "commercial and industrial property" within the meaning of § 1513(d) because it was not "subject to a property tax levy." 372 N.W.2d at 110; App. A, *infra.* 7a. Thus the court held that § 1513(d) precluded consideration of this tax-exempt property for discriminatory ratio or rate comparison.

The dissenting judge criticized the majority's opinion as permitting a "greater discrimination when the [commercial and industrial] property is completely exempt than when it is taxed, but at a lower rate." 372 N.W. 2d at 112; App. A, *infra,* 10a. He agreed fully with the contrary result reached by the North Dakota Supreme Court in *Northwest Airlines, Inc. v. State Bd. of Equalization,* 358 N.W. 2d 515 (N.D. 1984). Section 1513(d) required, in his opinion, that "since the level of assessment on commercial and industrial property is zero, the level of assessment on the airlines' personal property must be reduced to zero." 372 N.W. 2d at 112, App. A, *infra,* 11a.

All four airlines filed a notice of appeal on October 9, 1985, invoking this Court's jurisdiction under 28 U.S.C. § 1257(2). App. D, *infra,* 23a.

THE QUESTION IS SUBSTANTIAL

The 1982 amendment to the Airport Development Acceleration Act was intended "to prohibit discriminatory property taxes imposed on air carriers." *Aloha Airlines, Inc. v. Director of Taxation,* 464 U.S. 7, 10 n. 13 (1983). No one disputes that the 1982 amendment (49 U.S.C. § 1513(d)) would prohibit South Dakota from taxing other commercial and industrial property at 5 cents or 25 cents or even 45 cents per $100 of assessed value, while at the same time taxing air carrier property (as the State did in 1983) at a rate of 54.34 cents. App. E-2, *infra,* 26a. But the South Dakota Supreme Court

upheld the state's discriminatory tax on air carrier property because other commercial and industrial property, rather than being taxed at a lower rate, was totally exempted from taxation.

This construction of the statute totally defeats its Congressional purpose, and would expose interstate carriers to a substantial risk of discriminatory taxation in states such as New York, Illinois, Massachusetts, and Pennsylvania that now exempt personal property from taxation. *See, infra,* 6-12. The South Dakota decision also conflicts squarely with that of the North Dakota Supreme Court, which read § 1513(d) to invalidate the identical discrimination when imposed by that state's tax laws. *See, infra,* 13-14. The resolution of this conflict will affect not only 92 certificated commercial air carriers, but also 397 railroads and more than 34,000 motor carriers that enjoy an identically worded federal immunity from discriminatory taxation against their more than $76 billion in property. *See, infra,* 11-12.[5]

I. THE DECISION BELOW EVISCERATES AN IMPORTANT FEDERAL STATUTE INTENDED TO FORBID IMPOSITION OF DISCRIMINATORY PROPERTY TAXES ON INTERSTATE CARRIERS.

A. Section 1513(d) Prohibits Discriminatory Taxation of Air Carrier Property.

In *Aloha Airlines, supra,* this Court struck down Hawaii's tax on an airline's gross receipts because that tax was one of a "proliferation of local taxes" that Congress had found "burdened interstate air transportation and, when coupled with the federal Trust Fund levies, imposed double taxation on air carriers." 464 U.S. at 9. The Court recognized that Sec. 7 of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, was intended to "pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance." *Id.* at 9 (quoting from *Evansville-Vanderburgh Airport Authority Dist. v. Delta Air*

[5] Railroads, unlike air and motor carriers, also enjoy an additional federal prohibition against "any other [state] tax which results in discriminatory treatment...." *See, infra,* note 17.

Lines, Inc., 405 U.S. 707, 721 (1972)). Local airport expansion and improvements instead were to be financed through the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970 (Pub. L. No. 91-258, § 208, 84 Stat. 250 (1970)) and funded by revenues from several federal aviation taxes. *Id. See generally, Massachusetts v. United States,* 435 U.S. 444, 448 (1978).

The Airport and Airway Improvement Act of 1982 authorized significant funding increases to improve both airports and air navigation facilities. S. Rep. No. 494, Vol. 2, 97th Cong., 2d. Sess., reprinted in 1982 U.S. Code Cong. Ad. News 1156, 1157. Block grants to the states of $428 million were authorized over a six year period to improve small commercial and general aviation airports. *Id.* at 1158. Congress at the same time "amended 49 U.S.C. § 1513 to prohibit discriminatory property taxes imposed on air carriers." *Aloha Airlines, supra,* 464 U.S. at 10 n. 13. *See* Airport and Airway Improvement of 1982, Pub. L. No. 97-248, § 532, 96 Stat. 701 (1982).

The 1982 amendment to § 1513 specifically declared certain property tax practices to "burden and discriminate against interstate commerce." 49 U.S.C. § 1513(d). The amendment prohibited discriminatory state taxation of airline property by making applicable to air carriers the already existing prohibitions against discriminatory taxation of motor carrier property. H. R. Rep. No. 760, 97th Cong., 2d. Sess., 722, reprinted in 1982 U.S. Code Cong. & Ad. News 1190, 1484. The amendment to § 1513 thus copied verbatim from § 31(a)(1) of the Motor Carrier Act of 1980 [6] language to forbid assessing or taxing airline property at ratios or rates higher than other commercial and industrial property. App. E-3, *infra,* 27a.

The legislative history of § 31(a)(1) of the Motor Carrier Act and of its predecessor in § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act") fill in

[6] Pub. L. No. 96-296, § 31(a)(1), 94 Stat. 823 (1980), as amended by the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1102 (1982) (49 U.S.C. § 11503a).

any gaps regarding the legislative intent of § 1513(d).[7] Section 31(a)(1) of the Motor Carrier Act was intended to outlaw "the assessment, levying or collecting of taxes on motor carrier property in a manner different from that of other commercial and industrial property . . . ." S. Rep. No. 411, 97th Cong., 2d. Sess. 30, reprinted in 1982 U.S. Code Cong. & Ad. News 2308 2337. The statute provided that "States may not tax at a level which unreasonably burdens or discriminates against interstate commerce." *Id.* The President of the Transportation Association of America ("TAA") testified that the legislation would "prevent state or local governments from assessing or taxing transportation property of ICC regulated bus lines on a discriminatory basis, *as compared to other business property* . . . ." (emphasis added) [8]

The antidiscrimination language of the Motor Carrier Act was substantially copied in turn from § 306 of the 4-R Act (49 U.S.C. § 11503),[9] whose legislative history reveals Congress' intent even more starkly. Congress was told that the definitions used in this Act had "been worded to make it perfectly clear that the carriers are . . . treated on the same basis as other industrial and commercial taxpayers." [10] The Act was designed to "mak[e] it unlawful, as an undue burden on interstate

[7] The statutory language itself and one paragraph from the already cited H. R. Rep. No. 97-760 constitute all of § 1513(d)'s explicit legislative history.

[8] *Deregulation of the Intercity Bus Industry: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 218 (1982).

[9] Sec. 20 of the 1982 Bus Regulatory Reform Act, amending the Motor Carrier Act to forbid discriminatory taxation of interstate bus lines, was described as "a carry-through of similar TAA-developed legislative language included in the Rail 4-R Act and the Motor Carrier Act of 1980. . . ." *Bus Regulatory Reform: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 97 Cong., 1st Sess. 455 (1981). *See, in addition, id.* at 194.

[10] *Railroad-1975: Hearings Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce*, 94 Cong., 1st Sess. 2150 (1975) (testimony of TAA). The language being described was that of a working draft of the bill that became the 4-R Act, and is reproduced at *id.*, 1507, 1553-55. This legislative language was developed by TAA. *See, supra*, note 9.

commerce, for a state or local tax authority to assess or tax on a discriminatory basis the transportation property of carriers subject to ICC regulation." [11]

Section 306 of the 4-R Act was the culmination of Congressional efforts to prohibit a "variety . . . . of discriminatory treatment in the assessing and taxing of railroads' properties by state and local governments," including specifically the practice of "classifying carrier property in a separate class from all other taxable property . . . ." [12] Congress' action was designed to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property . . . ." (*Id.* at 2).[13]

The South Dakota statutes classifying airline flight property as taxable (S.D. Codified Laws §§ 10-6-34.1, -29-8) while classifying other commercial and industrial personal property as tax exempt (S.D. Codified Laws § 10-4-6.1) constitute exactly the kind of discrimination against interstate carriers that 49 U.S.C. §§ 1513(d), 11503, and 11503a intended to prohibit. These taxes thus may not constitutionally be imposed upon the appellant airlines. *Aloha Airlines, supra.*

[11] *Id.* at 2150. The working draft being described at these hearings did not yet contain the catch-all prohibition against all other discriminatory taxes on railroads that later was added to the bill and enacted as part of § 306. See 49 U.S.C. § 11503(b)(4). *Id.* at 1837 (testimony of Stephen Ailes, President, Association American Railroads) and 1883 (testimony of Stuart H. Johnson, Counsel for New York Dock Railway).

[12] S. Rep. No. 630, 91st Cong., 1st Sess. 17, 18 (1969) (Letter from the Interstate Commerce Commission). This Court had held in *Nashville, C. & S.L. Railway v. Browning*, 310 U.S. 362 (1940), that such differing classification did not violate the equal protection clause of the Fourteenth Amendment.

[13] "The legislative history of these prior bills provide great insight into Congress' intent in passing [49 U.S.C.] § 11503;" the courts thus properly may "rely on the legislative histories of these prior bills . . . in interpreting § 11503." *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865, n. 6 (9th Cir. 1983), *cert denied*, 464 U.S. 846 (1983). *Accord Arizona v. Atchison T. & S.F.R. Co.*, 656 F.2d 398, 404 n. 6 (9th Cir. 1981); *Burlington N.R. Co. v Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 971 (1984); *Atchison T. & S.F.R. Co. v Lennen*, 732 F.2d 1495, 1497 (10th Cir. 1984).

B. The Court Below Misconstrued § 1513(d) To Reach a Result Diametrically Opposed To Congress' Intent.

The South Dakota Supreme Court ignored the history of § 1513(d) and its predecessors, and misconstrued the statute to condone exactly the kind of discriminatory tax classification the statute was designed to prohibit. The court held that business property exempt from taxation was not "subject to a property tax levy," and thus was excluded from § 1513(d)'s definition of "commercial and industrial property." 372 N.W. 2d at 110; App. A, *infra*, 7a. By these magical semantics, all noncentrally assessed property was made to disappear, at least insofar as § 1513(d) was concerned. Since the court was unable to find in South Dakota any commercial and industrial property taxed at a lower rate than airline property, § 1513(d) had not been violated, and thus South Dakota's airflight property tax could be preserved. 372 N.W. 2d at 108; App. A, *infra*, 9a.

This construction of § 1513(d) is "plainly at variance with the policy of the legislation as a whole." *Ozawa v. United States*, 260 U.S. 178, 194 (1922). The South Dakota Supreme Court should have appraised "the purpose as a whole of Congress in analyzing the meaning of clauses or sections. . . ." *United States v. American Trucking Assoc.*, 310 U.S. 534, 544 (1940); *accord United States v. Morton*, 104 S. Ct. 2769 (1984). The actual discriminatory effect of the state's tax structure must be considered, for only by so doing can the courts render a decision "faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 150 (1979).

Upholding South Dakota's "absolute" discrimination against airline property (372 N.W. 2d at 112; App. A, *infra*, at 10a) is wholly contrary to the purpose and history of § 1513(d). The "subject to a tax levy" language of § 1513(d)(2)(D) was intended to recognize only such traditional exemptions as those for charitable property.[14] This definition was not intended to transmogify the statute into one

[14] The federal statutes were "not intended to interfere with the classification of property by a State for rate purposes into the traditional breakdown of

(footnote continues)

that outlawed partial, but permitted total, discrimination against air carrier property.

The South Dakota Supreme Court so misconstrued § 1513(d) as to eviscerate the air carriers' important federal protection against discriminatory state property taxes. It reached this result only by ignoring both the statute's legislative history and this Court's prior decisions. This Court thus should note probable jurisdiction to review the substantial federal question raised by this erroneous decision.

II. THE SOUTH DAKOTA DECISION, IF NOT REVERSED, COULD ADVERSELY AFFECT ALL INTERSTATE CARRIERS IN MANY ECONOMICALLY SIGNIFICANT STATES.

If the South Dakota court's erroneous construction of § 1513 remains unreversed by this Court, it will expose the property of all interstate carriers to significant risks of discriminatory taxation. Other states, including New York, Illinois, Massachusetts, and Pennsylvania, exempt commercial and industrial personal property from state taxation.[15] The South Dakota decision invites each of those states to impose a discriminatory tax not only on airline property, but on all the property of all other interstate carriers. Their facilities and property represent "nonvoting, often non-resident, targets for local taxation" and thus are "easy prey for state and local tax assessors." S. Rep. 630, 91st Cong., 1st Sess. 3 (1969).

This risk of discriminatory taxation affects more than just the operating property of the 92 interstate air carriers with a net value of approximately $24.6 billion.[16] As already noted, the

(footnote continued)

real property, tangible personal property, and intangible property . . ., [or to] restrict State action in extending total or partial exemption to property of a class, such as churches, charitable institutions, homesteads, and the like." S. Rep. No. 630, 91st Cong., 1st Sess. 11 (1969). *See, in addition, Arkansas-Best Freight System, Inc. v. Lynch*, 723 F.2d 365 (4th Cir. 1983).

[15] See N.Y. Real Property Tax Laws § 300 (McKinney 1980); Mass. Ann. Laws ch. 59 § 5 (Michie/Law. Co-op. 1982); Ill. Rev. Stat. § 81-1 (1979); 72 Pa. Cons. Stat § 3243.

[16] *Air Carrier Financial Statistics*, U.S. Dept. of Transportation, ii, 73, 113 (as of Dec. 31, 1984).

antidiscrimination provisions of § 1513(d) were copied verbatim from the earlier statutes applicable to motor carriers and to railroads. All three statutes use the same definition of "commercial and industrial property," i.e., nontransportation and nonagricultural property "devoted to a commercial or industrial use and subject to a property tax levy." [17] Thus review of the decision below is of vital concern not only to the 92 certificated interstate air carriers, but also to 397 interstate railroads, with operating property valued at well over $43 billion;[18] more than 34,000 interstate trucking firms with more than $7.6 billion in operating property;[19] and 3,175 interstate bus lines with operating property of more than $665 million.[20] The decision below thus also warrants review by the Court because that decision exposes the total $76 billion property of all interstate surface and air carriers to a significant risk of discriminatory taxation.

III. THE SOUTH DAKOTA DECISION DIRECTLY CONFLICTS WITH A DECISION BY THE HIGHEST COURT OF ANOTHER STATE.

As the dissenting judge noted (372 N.W. 2d at 112; App. A, *infra*, 10a), just eight months earlier the Supreme Court of North Dakota held that "assessing and taxing airline property while exempting other commercial and industrial property is

[17] *Compare* 49 U.S.C. § 1513(d)(2)(D) *with* 49 U.S.C. § 11503(a)(4) and 11503a(a)(4). Section 306 of the 4-R Act contains an additional prohibition not found in § 1513(d) (airlines) or § 11503a (motor carriers) against a state imposing "any other tax which results in discriminatory treatment of a common carrier by railroad . . ." 90 Stat. 54. In *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981) *cert. denied*, 454 U.S. 1086 (1981), the court held a state statute invalid under this catch-all provision, making it unnecessary to reach the definitional question decided by the South Dakota Supreme Court in this case.

[18] Net investment only for the 32 Class I railroads (i.e., railroads with annual operating revenues exceeding $50 million). *ICC 84*, Interstate Commerce Commission Annual Report, 122 (1982). Though 49 U.S.C. § 11503 uses the same definitions as § 1513(d), the practical impact on the railroads of the South Dakota decision may be lessened because of the catch-all prohibition of 49 U.S.C. § 11503(b)(4). *See supra*, n. 17.

[19] Net investment only for the 1,088 Class I motor carriers of property. (Annual operating revenue exceeding $5 million.) "ICC 84" *supra*, at 122.

[20] Net investment only for the 64 Class I motor carriers of passengers (annual operating revenue exceeding $3 milion). *Id.*

prohibited by 49 U.S.C. § 1513(d)." *Northwest Airlines, Inc. v. State Bd. of Equalization*, 358 N.W. 2d 515, 517 (N.D. 1984). Relying on this Court's opinion in *Aloha Airlines, supra*, the North Dakota Supreme Court discerned, and gave effect to "the intent of Congress . . . to prohibit discriminatory state taxes because of the adverse affect of such discrimination on interstate commerce." 372 N.W. 2d at 112. The North Dakota court specifically rejected the argument that tax exempt business property was excluded from the § 1513(d)(2)(D) definition of "commercial and industrial property" because such property was not "subject to a property tax levy." [21] *Id.* The court explained:

> Interpreting 49 U.S.C. § 1513(d) as the State would have us do would permit greater discrimination when the property is completely exempt than when it is taxed at a lower rate. That is unreasonable. We have repeatedly held that statutes must be construed to avoid ludicrous and absurd results.

Id.

This Court should review the decision below in order to resolve the irreconcilably conflicting interpretations of § 1513(d) by the highest courts of North Dakota and South Dakota.

IV. THIS COURT IS THE ONLY FEDERAL TRIBUNAL AVAILABLE TO AIRLINES CONTESTING STATE PROPERTY TAXES AS VIOLATIVE OF THE ANTIDISCRIMINATION PROVISIONS OF § 1513(d).

The appellant airlines seek, as interstate carriers, to avail themselves of an important federal statutory protection against state-imposed discrimination. Their ability to assert this protection in the lower federal courts is severely limited, however, by the Tax Injunction Act, 28 U.S.C., § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax

[21] The North Dakota Supreme Court agreed with that of South Dakota, however, in holding that the challenged property taxes were not "in lieu" taxes permissible under § 1513(d)(3). 358 N.W.2d at 518.

> under State law where a plain, speedy and efficient remedy may be had in the state courts.

This statute, although deferring to the states' needs for efficient administration of their tax laws, was not intended to preclude federal review of asserted state infringement of federal rights, but merely to establish the manner and time of that review—i.e., appellate review by this Court after decision by the highest state court.[22] The House Judiciary Committee Report on § 1341 recognized the need for a federal forum when it stated:

> But it must be remembered that in such cases, in the event of an adverse decision of the State court, an appeal lies to the United States Supreme Court so that the contestant may ultimately have his constitutional rights determined by the highest Federal court, even though he may not have access in the first instance to the United States district courts.

H.R. Rep. No. 1503, 75th Cong., 1st Sess. 3(1937).

In observing the limitations of the Tax Injunction Act, this Court has noted the availability of such appellate review and has assured litigants that if the taxpayer proceeds unsuccessfully through a state court system, he may then "assert his federal rights and secure a review of them by this Court." *Great Lakes Dredge & Dock Company v. Huffman,* 319 U.S. 293, 301 (1943). *See, in addition, Arizona v. New Mexico,* 425 U.S. 794, 797(1976), where this Court abstained from ruling on a tax controversy between two states until the asserted federal question had been considered by the appropriate state courts.

But the adequacy of the appellants' remedy depends on this Court's accepting jurisdiction over their appeal. Appellants have followed the prescribed course within South Dakota's tax appeal system and have been rebuffed. Only in this Court may appellants find a federal forum in which to vindicate the

[22] Air carriers, unlike railroads and motor carriers, may not challenge discriminatory state taxes in the federal district courts. See 49 U.S.C. §§ 11503(c) and 11503a(c).

important federal protection conferred upon them by § 1513(d).

CONCLUSION

For these reasons, the Court should note probable jurisdiction in this case. Indeed, we respectfully suggest that the decision of the South Dakota Supreme Court so clearly misconstrued 49 U.S.C. § 1513(d) as to warrant summary reversal.

Respectfully submitted,

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October, 1985

APPENDIX

7/31/85

APPENDIX A

IN THE

Supreme Court of the State of South Dakota

WESTERN AIR LINES, INC.,
a corporation, *et al.*,

Plaintiffs and Appellants,

v.

HUGHES COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS, *et al.*,

Defendants and Appellees.

Appeal From The Circuit Court Of The
Sixth Judicial Circuit Hughes County, South Dakota
Honorable Robert A. Miller Judge

R. C. RITER and
ROBERT C. RITER, JR., of
RITER, MAYER, HOFER & RITER
Pierre, South Dakota

Attorneys for plaintiffs and appellants.

JOHN DEWELL
Assistant Attorney General
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On the brief:

MARK V. MEIERHENRY
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Pierre, South Dakota

Attorneys for defendants and appellees.

Argued October 23, 1984

MORGAN, *Justice.*

The question raised by this appeal is whether 49 U.S.C. § 1513(d) amending the Airport Development Acceleration Act of 1973, preempts SDCL ch. 10-29, Taxation of Airline Flight Property (tax). The appeal involves the various actions of five airlines, Western Air Lines, Republic Airlines, Frontier Airlines, Ozark Air Lines and Continental Airlines (airlines) seeking redress for 1982 taxes assessed by the Department of Revenue of the State of South Dakota (Department) and paid under protest to the various counties of Brown, Beadle, Davison, Hughes, Pennington, Minnehaha, Codington, and Yankton. It also involves an appeal from the State Board of Equalization's denial of a petition to exempt the airlines' flight property from 1983 taxes. Forty-two cases in all were consolidated by stipulation and order of the trial court below. At the pertinent times, the airlines were authorized to and did transact business in South Dakota as air carriers. The trial court affirmed the Department on the appeal, entered judgment for the counties on the suits for rebate, and dismissed airlines' actions on their merits. Airlines appeal and we affirm.

Prior to 1961, any airline operating in South Dakota was only taxed for property located in the state, for fuel purchased in the state, and for the privilege of landing in the state but aircraft were not taxed. In 1961, Chapter 449 of the Session Laws of 1961, the Airline Flight Property Tax, was enacted. Codified as SDCL ch. 10-29, the tax provided for central assessment by Department of all airline flight property used in South Dakota.[1] The legislation further provided that airline flight property should not be otherwise taxed. SDCL 10-29-2. The assessments are based on the value and use of airline flight property which actually provides service in the state. The three use factors involved in the assessment are set out in SDCL 10-29-10. The revenues realized by the tax are allocated to the airports used by the airline companies and are to be exclusively used for airport purposes, as determined by the local airport governing bodies and approved by the Department of Transportation. SDCL 10-29-15.

[1] SDCL 10-29-1(4) provides: " 'Flight property' means all aircraft fully equipped ready for flight used in air commerce[.]"

The airlines have been paying the tax without protest from its inception or from their entry into the state, whichever comes later, until 1982 when they paid under protest, and suits were commenced for their recovery per SDCL 10-27-2.

In enacting Chapter 72 of the 1978 Session Laws entitled "An Act to provide for the repeal of personal property tax," the legislature, after classifying and exempting certain personal property described as personal effects, household furnishings, home appliances, and sporting and hobby goods, provided that "[p]ersonal property as defined in [SDCL] 10-4-6 *which is not centrally assessed* is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation." (Emphasis added.) The Act further provided: "The exemptions created by this Act shall not impair or repeal any tax or fee which heretofore has been authorized to be levied or imposed in lieu of personal property tax." S.D. Sess.L. ch. 72, § 9. These two provisions are now codified as SDCL 10-4-6.1.

In 1982, the United States Congress amended the Airport Development Acceleration Act of 1973. A new section, codified at 49 U.S.C. § 1513(d), generally prohibits burdensome and discriminatory taxation of air carrier transportation property. Specifically, § 1513(d) provides that states may not assess air carrier transportation property at a higher ratio to true market value than the ratio used to assess other commercial and industrial property; or levy or collect an ad valorem property tax on airflight property at a rate in excess of the rate applied to other commercial and industrial property in the same jurisdiction. 49 U.S.C. § 1513(d)(1). The 1982 amendment contains an exception to its preemption of state taxes on airflight property. 49 U.S.C. § 1513(d)(3) provides: "This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes."

The trial court determined that SDCL ch. 10-29 meets the requirements of 49 U.S.C. § 1513(d)(3), concluding as a matter of law that the tax imposed, being an in lieu tax under the provisions of SDCL 10-4-6.1 used solely for airport and aeronautical purposes, SDCL 10-29-15, does not violate the provisions of 49 U.S.C. § 1513(d) and is an appropriate tax upon the airlines under state and federal law.

The airlines raise two issues on their appeal. First, is the tax imposed by SDCL ch. 10-29 "in lieu" of another valid tax so as to be authorized under 49 U.S.C. § 1513(d)(3)? Second, does the airline flight property tax imposed under SDCL ch. 10-29 discriminate against appellant airlines and is it violative of 49 U.S.C. § 1513(d)(1)?

The basic issue before us is whether the tax conflicts with § 1513(d) and thus violates the supremacy clause. Our inquiry is based on the assumption that, "absent the clear and manifest intent of Congress, the reserved powers of the States are not superseded by federal legislation." Lead-Deadwood School Dist. v. Lawrence Cty., 334 N.W.2d 24, 25 (S.D. 1983). The full enactment of § 1513(d) reads as follows:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
>
> (B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or
>
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (2) In this subsection—
>
> (A) "assessment" means valuation for a property tax levied by a taxing district;
>
> (B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

> (C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board owned or used by an air carrier providing air transportation;
>
> (D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and
>
> (E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.
>
> (3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

Obviously, it was not the intent of Congress to preclude all ad valorem taxes on air carriers' property. An ad valorem tax which meets certain balancing requirements in relation to other commercial and industrial property would be acceptable under (d)(1), as would an "in lieu tax" wholly utilized for airport and aeronautical purposes under (d)(3).

Inasmuch as the trial court found the tax to fall within the latter classification, we will review that first. The trial court relied on the history of central assessments of utilities and the provisions of SDCL 10-4-6.1, *supra,* referring to taxes or fees authorized to be levied or imposed in lieu of personal property tax to determine the tax was an "in lieu" tax. With that conclusion, we must disagree.

We first define the term "in lieu tax." It is not defined in the statute nor is it a term in common usage. "Lieu tax" means instead of, or, a substitute for, and it is not an additional tax. Black's Law Dictionary 832 (5th Ed. 1979), *citing* Lebeck v. State, 62 Ariz. 171, 156 P.2d 720 (1945). In *Lebeck,* the citizens of Arizona had adopted a constitutional amendment substituting a license tax (lieu tax) on motor vehicles for personal property ad valorem taxes on such vehicles.

In the case at bar, however, the tax is not a substitute for an ad valorem personal property tax. It is in fact the first

imposition of personal property tax on the airline flight property. It is an additional tax to the personal property taxes theretofore existing; nor does the reference in SDCL 10-4-6.1 to "in lieu" change that obvious fact.

"The name by which a tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents . . . ." Goodenough v. State, 328 Mich. 56, , 43 N.W.2d 235,239 (1950), *quoting* Dawson v. Kentucky Distilleries Co., 255 U.S. 288,292, 41 S.Ct. 272,274, 65 L.Ed. 638,645 (1921).

We therefore hold that the trial court erred in determining that the tax was an in lieu tax, but we further hold that the trial judge arrived at the right result of upholding the tax, but for the wrong reason. In our opinion, the tax is a valid imposition under the balancing test previously referred to under § 1513(d)(1).

Unlike the provision of (d)(3), the terminology of (d)(1) is clear and unambiguous. Subparagraph (A) essentially prohibits a discriminatory assessment ratio to true market value as between air carrier property and other commercial and industrial property. Subparagraph (C) essentially prohibits a discriminatory tax rate as between air carrier property and other commercial and industrial property.

Airlines cite us to Arizona Public Service Co. v. Sneed, 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106 (1979). Their reliance is misplaced. The factual situation is totally incomparable. Also, the federal statute, 15 U.S.C. § 391, which preempts the right of the state to tax electrical generation and transmission, is entirely different than the federal statutes under consideration herein. Likewise, Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983), is distinguishable as dealing with a gross receipts tax which is a form of "head tax" prohibited by 49 U.S.C. § 1513(a), an entirely different section than we are discussing here.

It is airlines' contention that the tax runs afoul of (d)(1) because the airlines, along with other centrally assessed businesses, are taxed on their personal property, whereas locally

assessed commercial and industrial businesses are not.[1] On its face, it appears to be a reasonable argument, but when one looks at the clear wording of the statute, it fails. Commercial and industrial property as used in (A) and (C) is defined to mean property, other than transportation property and land used for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy.* 49 U.S.C. § 1513(d)(2)(D). The locally assessed personal property, being exempt from property tax levy, cannot be included as commercial or industrial property for comparison under either (A) or (C).

The prohibition in (d)(1), with one exception, is almost verbatim to the prohibition found in federal legislation dealing with railroads and motor vehicles under the Revised Interstate Commerce Act of 1978 and the earlier Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 et. seq. (4-R Act). The 4-R Act was discussed in Atchison, Topeka & Santa Fe Ry. v. State of Ariz., 559 F.Supp. 1237 (D.Ariz. 1983). In that case, the Arizona Constitution exempted from taxation manufacturers' inventory, a form of personal commercial property. The plaintiffs were contending that this property should nevertheless be considered as commercial and industrial property "subject to a property tax levy" in the sense that it could be taxed if the people chose to amend the constitution. The court termed this interpretation unreasonable. It defined property subject to tax levy as property which is presently taxed. "Property which is for any reason tax-exempt is excluded as a form of commercial and industrial property." *Id.* at 1245.

The airlines cite us to the case of Otter Tail Power v. State, Civ. 82 3044 (D.S.D. Mar. 7, 1984), wherein the taxation of railroad cars was rejected by application of the 4-R Act. The trial court's opinion made no mention of the phrase "and subject to property tax levy." Rather, the decision followed an Eighth Circuit decision, Ogilvie v. State Bd. of Equalization, 657 F.2d 204 (8th Cir.), *cert. denied* 454 U.S. 1086, 102 S.Ct.

[1] The airlines enjoy the same exemption on the balance of their personal property, which was locally assessed, as do the other commercial and industrial businesses.

644, 70 L.Ed.2d 621 (1981), a case involving taxation of personal property in North Dakota and likewise relied on heavily by airlines. We find the *Ogilvie* case strongly supportive of the tax rather than the preemption of it.

Ogilvie dealt with both real and personal property. The issue as to the real property centered around the assessment ratio to true value as between the centrally assessed railroad property and the locally assessed commercial and industrial property of other businesses. That is not relevant here. The second issue, however, is very much in point and in our opinion supports the imposition of the tax in this case.

Ogilvie was concerned with the preemption by the 4-R Act of North Dakota's imposition of taxes on railroad property. As we have noted before, the 4-R Act, with one exception, is almost verbatim with § 1513(d)(1). At this point, that exception looms large. Section 1513(d)(1) sets out three prohibitions comparable to the first three prohibitions in the Revised Interstate Commerce Act, 49 U.S.C. § 1503, and the 4-R Act, § 306. The latter two acts, however, also contain a fourth prohibition, "the imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

It is noteworthy that the 4-R Act was enacted in 1976 and the Revised Interstate Commerce Act in 1978. In 1982, Congress, in enacting § 1513(d)(1), while following closely the first three sections of the earlier acts, omitted any reference to the fourth.

In *Ogilvie,* at the trial court level, 492 F.Supp. 446 (D.N.D. 1980), the trial judge first determined that the inclusion of personal property and trade fixtures in the assessed value of railroad property does not violate § 306(1)(a), (b), or (c) (the prohibitions similar to § 1513(d)(1)). With respect to (a), the prohibition of a higher assessment ratio, he determined that the inclusion of the locally assessed personal property would affect the total assessed value but not the assessment ratio.[2] Thus, of course, a levy and collection of a tax assessed under (a) would not violate (b). As to (c), the trial court

[2] This is an alternate theory to the one we adopt, but we nevertheless find it highly persuasive.

engaged in the same reasoning as the court did in *Atchison, Topeka & Santa Fe, supra,* holding that "the personal property of locally assessed businesses is not commercial and industrial property for purposes of § 30[6](1)(c) for § 306(3)(c) defines commercial and industrial property as property "which is subject to a property tax levy." 492 F.Supp. at 453. He held that locally assessed personal property is not commercial and industrial property because it is not subject to a property tax levy and, therefore, not comparable to transportation personal property to determine whether § 306(1)(c) has been violated.

The trial court then went on to find that the North Dakota tax scheme ran afoul of the fourth prohibition in § 306, the "any other tax" provision, which is not found in § 1513(d)(1). The court first reasoned that since the tax sought to be imposed did not fall under the preceding sections it was, therefore, encompassed within the term "any other tax." It went on to determine that it was discriminatory and concluded that it violated § 306(1)(d).

The Eighth Circuit stated in *Ogilvie* that "the district court properly interpreted both the language and intent of § 306." 657 F.2d at 210. The decision therefore supports the decision of Judge Jones in *Otter Tail Power, supra,* and the decision of this court in Montana-Dakota Util. v. S.D. Dept. of Rev., 337 N.W.2d 818 (S.D. 1983), both railroad cases, as well as the decision of this court to hold that § 1513(d)(1) does not preempt the airline flight property tax.

We affirm the judgment of the trial court.

FOSHEIM, *Chief Justice,* WOLLMAN, *Justice,* and WUEST, *Circuit Judge,* acting as a Supreme Court Justice, concur.

HENDERSON, *Justice,* concurs in part and dissents in part.

Although I agree with the majority's ruling on the in lieu arguments, I dissent on the imposition of the tax which is the crucial holding of the majority opinion.

Congress' intent in enacting 49 U.S.C. § 1513(d) was "to prohibit discriminatory property taxes imposed on air carriers." Aloha Airlines v. Director of Taxation, ____U.S.____, 104 S. Ct. 291,293, 78 L.Ed.2d 10, 13 n.3 (1983). *See also* the letter from the United States Senate Committee on Commerce,

Science, and Transportation, dated December 21, 1982, attached hereto and by this reference incorporated herein, which clearly reflects that the purpose of the act "is to prevent the continued discrimination of ad valorem taxation of airline flight property." That Congress has the authority to so control state taxation of air carriers in interstate commerce is beyond question. *See* Arizona Public Service Co. v. Snead, 441 U.S. 141,150, 99 S.Ct. 1629,1634, 60 L.Ed.2d 106,113 (1979). Congress' authority to so regulate is derived from the Commerce Clause of the United States Constitution and it is axiomatic that when a federal statute forbids state imposition of a tax, the state statute imposing the tax is preempted. *Aloha Airlines,* ____U.S. at ____, 104 S.Ct. at 294, 78 L.Ed.2d at 15.

The majority, however, determines that 49 U.S.C. § 1513(d) does not preempt the airline flight property tax imposed by SDCL ch. 10-29. The majority's rationale is that because locally assessed personal property is exempt from a property tax levy, it is not commercial or industrial property *subject to a property tax levy* under 49 U.S.C. § 1513(d)(2)(D), and thus, it cannot be used for discriminatory ratio or rate comparisons.

Such a construction of 49 U.S.C. § 1513(d) was recently rejected by the Supreme Court of North Dakota in Northwest Airlines v. State Bd. of Equalization, 358 N.W.2d 515 (N.D. 1984), and I accept the reasoning advanced therein over that of the present majority. Chief Justice Erickstad, in addressing an assertion by the State similar to the majority's rationale herein, wrote for a unanimous court that: "The construction urged by the State would allow discriminatory taxation of air carrier transportation property as long as a state imposed no tax at all on other commercial and industrial property. We cannot reasonably so construe the statute." *Id.,* 358 N.W.2d at 517. I, too, reject such a construction of 49 U.S.C. § 1513(d). The discrimination sought to be imposed against air carriers in this state is absolute.

Personal property taxes were repealed in 1978. *See* 1978 S.D. Sess. Laws chs. 72 and 73. The State, however, through SDCL ch. 10-29, still seeks to impose a personal property tax on airline flight property while all other commercial and industrial property is exempt from personal property taxes. By enacting

49 U.S.C. § 1513(d), the United States Congress sought and intended to eliminate burdens on interstate commerce by prohibiting discriminatory state taxes imposed on air carrier transportation property. To permit, as the majority's interpretation does, the taxation of airline personal property when all other commercial and industrial personal property is exempt from taxation, is to permit a "greater discrimination when the [commercial and industrial] property is completely exempt than when it is taxed, but at a lower rate. That is unreasonable." *Id.,* 358 N.W.2d at 517. Since the level of assessment on commercial and industrial personal property is zero, the level of assessment of the airlines' personal property must be reduced to zero. "A construction which accords with reason is to be preferred to a literal construction involving a palpable absurdity." Rice v. City of Watertown, 66 S.D. 221,223, 281 N.W. 116,117 (1938).

"[A]ssessing and taxing the Airlines' personal property while exempting other commercial and industrial personal property from taxation is prohibited by 49 U.S.C. § 1513(d)." 1513(d)." Airlines, 358 N.W.2d at 517. I would reverse the circuit court and rule that 49 U.S.C. § 1513(d) forbids the taxes imposed by SDCL ch. 10-29, and thus the latter is preempted by federal law.

United States Senate
Committee on Commerce,
Science, and Transportation
Washington, D.C. 20510

December 21, 1982

Mr. Paul R. Ignatius
President
Air Transport Association of America
1709 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Ignatius:

You have requested, on behalf of your airline members, clarifications of the legislative intent of Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (the "Act") concerning the assessment, levying or collecting of ad valorem flight property taxation of airline companies.

The purpose of the Act is to prevent the continued discrimination of ad valorem taxation of airline flight property. However, the Act must be interpreted in a manner that recognizes that all states do not have the same timetable for assessing and collecting such taxes. It was not intended to require a state to refund property taxes which have been levied and collected prior to the effective date of the Act, September 3, 1982.

The legislative intent is supported by Subparagraphs (B) and (C) of the Act which provide that relief from discriminatory assessments must be made when the taxes have not been actually levied and collected before the effective date of the Act. Furthermore, the purpose of Subparagraph (A) was to preclude discriminatory assessments, in the event they had not been made by September 3, 1982.

Unless a state has levied and collected discriminatory ad valorem flight property taxes on airline companies before September 3, 1982, that method of taxation should not be in effect during 1982.

Sincerely,

NORMAN Y. MINETA — BOB PACKWOOD

NANCY LANDON KASSEBAUM — HOWARD W. LAMDON

APPENDIX B

In Circuit Court
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES } ss:

WESTERN AIRLINES, INCORPORATED,
a Corporation,
Plaintiff,

v. MEMORANDUM DECISION

HUGHES COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS, *et al,*
Defendants.

FACTS

The above action comes before this Court by way of stipulation and order of consolidation. Five airlines, Western, Republic, Frontier, Ozark and Continental, (Plaintiffs) are involved in this litigation.

Four of the airlines involved, Republic, Western, Frontier, and Ozark, by way of notice of appeal and summons and complaint, seek an abatement and refund of taxes paid under protest for the year 1982. Counties involved in this series of suits are Brown, Beadle, Davison, Hughes, Pennington, Minnehaha, Codington and Yankton.

By stipulation of the parties, this Court also has before it appeals on the 1983 tax assessment by Republic Airlines against Minnehaha, Pennington, Brown, Codington and Yankton Counties; Western Airlines against Hughes, Minnehaha and Pennington Counties; Frontier Airlines against Pennington and Minnehaha Counties; Continental Airlines against Pennington County; and Ozark Airlines against Minnehaha County. These

four airlines are appealing the decision of the State Board of Equalization, which denied their petition to exempt its airline flight property from the 1983 tax.

Forty-two cases have been consolidated by stipulation and are jointly decided under the heading of Western Airlines v. Hughes County Board of Commissioners, et al.

Plaintiff airlines are all duly organized corporations authorized to transact business in South Dakota as air carriers. Each transacted business and maintained air carrier transportation property within South Dakota during 1982 and 1983.

In 1978 the South Dakota Legistlature repealed the personal property tax provisions. The Legislature took care to insure that the repeal of personal property taxes did not nullify the uniform taxation under which the utilities were already subjected. It adopted §10-4-6.1, which provides:

> Personal property as defined in § 10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal and tax or fee authorized to be levied or imposed in lieu of personal property tax.

SDLC 10-29 provides for the taxation of airline flight property. Included within this section are procedural steps outlining the method of assessing the airline property.

Section 10-29-2 mandates that flight property of airline companies operating within South Dakota be assessed by the Department of Revenue (Department). Each airline is required to submit an annual report specifying the following:

> Name of company; nature of company; location of principal office; officers of company; annual financial statement; total tonnage of passengers, express and freight first received and finally discharged in the state; total hours flown by aircraft serving the state; total revenue ton miles in the state; total ton miles within and without the state; air flight property accounts by types of equipment; inventory of real and personal property by location, and original cost. § 10-29-3.

Section 10-29-8 provides that the Department shall annually assess all flight property of airline companies serving the state. Section 10-29-9 requires that the Secretary of Revenue determine the true and full value of that flight property actually providing service in this state.

Section 10-29-10 requires that the overall valuation of flight property be apportioned to the state and be determined on the basis of the use of the property in the state. The Legislature has established a formula for determining the valuation of airline property and properly appropriating it to this state.

The Department determines the proper allocation of airline property in South Dakota by basing the average of the total of the following three ratios for each type of aircraft;

> (1) That ratio which the total tonnage of passengers, express and freight first received by the airlines company in this state during the preceding calendar year plus the total tonnage of passenger, express and freight finally discharged by it within this state during the preceding calendar year bears to the total of such tonnage first received by the airline company or finally discharged by it, within and without this state during the preceding calendar year;
>
> (2) That ratio which the flight time of all aircraft of the airline company on flights serving this state during the preceding calendar year bears to the total of such time in flight within and without this state during the preceding calendar;
>
> (3) That ratio which the number of revenue ton miles of passengers, mail, express and freight flown by the airline company on flights serving this state during the preceding calendar year bears to the total number of such miles flown by

it within and without the state during the preceding calendar year.

Once an assessment is made through the factoring process of in-state operations, passengers, freight and time to the total operation of the company, a determination is made of the average mill rate in the state. This is accomplished by dividing the total taxable valuation of all property for the preceding year within this state into the total of all state and local taxes levied within the state on a millage basis for the present year. The Department then applies the mill rate on the value allocated to the airline company for business done in the state. Once a determination is made of the amount of taxes due, an allocation of proceeds collected is distributed to the various airports serving the airlines. § 10-29-15 mandates that receipt of these monies shall be allocated to the airports where such airline companies make regularly scheduled landings in the following manner:

(1) twenty-five (25) percent of the tax assessed to each airline company allocated equally to each airport in the state served by the airline company;

(2) seventy-five (75) percent of the total tax assessed to each airline company allocated on the basis which that ratio of total tonnage of passengers, mail, express, and freight first received and finally discharged at each airport during the preceding calendar year bears to the total tonnage of passengers, mail, express, and freight first received and finally discharged at all airports in the state served by the airline company during the preceding calendar year.

§ 10-29-15 further provides:

> . . . the taxes imposed by this chapter . . . shall be used exclusively by such airports for airport purposes as determined by the local governing body and approved by the department of transportation . . .

The Department assessed and collected (under protest) taxes from Plaintiffs pursuant to § 10-29 for 1982. The Department has also assessed taxes against plaintiffs for 1983. Plaintiffs appealed the 1983 tax assessment imposed and the State Board of Equalization denied the airlines' petition to exempt its airline flight property from the 1983 tax assessment.

Beginning in 1978, the U.S. Congress passed the first of several acts designed to combat tax discrimination with respect to businesses involved in interstate commerce. A portion of the Airport and Airway Improvement Act of 1982 addressed and prohibited the imposition of burdensome and discriminating acts against air carrier transportation property. This particular piece of legislation is codified at 49 USC § 1513(d) and provides:

> d. Burdensome and discriminatory acts.
>
> 1. The following acts unreasonably burden and discriminate against interstate commerce and a state, subdivision of a state, or authority acting for a state or subdivision of a state may not do any of them:
>
> A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
>
> B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or
>
> C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

2. . . .

3. This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

Plaintiffs argue that the provisions of § 10-29 impose an unreasonable burden upon them and that taxation pursuant to this section is discriminatory since commercial and industrial property in the state of South Dakota is exempt from the personal property tax, whereas all air carrier transportation property is subjected to taxation pursuant to § 10-29. Further, Plaintiffs argue that 49 USC 1513 preempts § 10-29. Plaintiffs maintain that enforcement of § 10-29 violates the federal statute as 49 USC 1513 is controlling and forbids this particular form of taxation. Lastly, Plaintiffs argue that the South Dakota Airline Flight Property Tax is not "in lieu" of another valid tax so as to fit under the exception carved out in § 1513(d)(3).

The Department argues that the tax imposed under the § 10-29 provision is an "in lieu" tax which is wholly utilized for airport and aeronautical purposes. The Department further argues that the South Dakota tax is not an unreasonable burden nor is it discriminatory against Plaintiffs. Therefore, the Department maintains that this tax is not preempted by federal law and may be imposed upon all airlines serving the state of South Dakota.

DECISION

In *Aloha Airlines, Inc. v. Director of Taxation*, 62 LW 4000, the United States Supreme Court acknowledged that by passage of the Airport and Airway Development Act of 1970, Pub. L. 91-258, 84 Stat. 219, Congress committed the federal government to assisting states and localities in expanding and improving the nation's air transportation system. Inevitably, problems with discriminatory taxation arose and by 1973 Congress saw the need to pass legislation prohibiting local taxes which burdened interstate air transportation. This was codified at 49 USC § 1513. However, in what appears to be an effort to revitalize the original intent of promoting the expansion and

improvement of our nation's airports, Congress amended § 1513 in 1982. The amendment prohibits discriminatory property taxes imposed on air carriers. It also declares that an "in lieu" tax which is wholly utilized for airport and aeronautical purposes is a permissible state tax.

South Dakota provides for the taxation of airline flight property under § 10-29. Plaintiffs maintain that this provision is in direct conflict with 49 USC § 1513 and therefore the state is preempted from imposing a tax upon the airlines.

Our Supreme Court has stated that when two statutes appear to be contradictory it is the court's duty to reconcile any such apparent contradiction and to give effect, if possible, to all of the provisions under consideration, construing them together to make them harmonious and workable. *In the Matter of Establishing Certain Territorial Electric Boundaries Within the State of South Dakota v. Northwestern Public Services Co.*, 281 NW2d 72 (S.D. 1979).

This Court is persuaded that § 10-29 is not in violation of § 1513. Construed together, § 10-29 and § 1513 are harmonious and workable.

It is clear that it was the intent of Congress to prohibit the imposition of state taxes which discriminate against airlines and impose unreasonable burdens on interstate commerce. It is also clear that Congress did not intend to disallow all state taxes imposed against airlines. It specifically included a provision which authorizes local taxation of airline property under certain conditions.

State taxes which are "in lieu" taxes and wholly utilized for airport and aeronautical purposes are permissable. If a state meets this two-prong test, the remaining subsection of § 1513(d) does not apply. The South Dakota provision meets the above criteria.

In 1978 South Dakota repealed the personal property tax provisions. The Legislature specifically provided for the continued taxation of certain personal property. § 10-4-6.1 provides:

> Personal property as defined in 10-4-6 which is not centrally assessed is hereby classified for ad valorem

tax purposes and is exempt from ad valorem taxation. *This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax.* (emphasis added)

Provision for the taxation of utilities is found in SDCL 10-28 through 10-37, with the exception of § 10-30, which was specifically repealed in 1980.

Airlines are assessed on a unit basis, as are other utilities in South Dakota. This method of assessment takes into account the whole operating unit nationwide and a portion of the entire unit is allocated to the state, based upon legislatively determined factors of use and presence in the state. Thus, it clearly is not an ad valorem tax.

As previously mentioned, the South Dakota Legislature provided for the taxation of utilities in SDCL 10-28 through 10-37, with the exception of 10-30, which was repealed. The enactment of these statutes, combined with the repeal of the personal property provisions and the "in lieu" provision contained within § 10-4-6.1, convinces this Court that § 10-29 is an "in lieu" tax, as are the other utility statutes. § 10-29 falls within the framework of § 10-4-6.1 and is an "in lieu" tax.

The second prong of § 15'3(d)(3) requires that any tax imposed upon airlines be wholly utilized for airport and aeronautical purposes.

§ 10-29-15 requires that monies collected pursuant to that chapter be used exclusively by the airports for aeronautical purposes. This is not a mere suggestion imparted by our Legislature, it is a directive. South Dakota statutes require that the funds be used in a manner which is consistent with and in accordance with the mandate of § 1513(d)(3).

In summary, this Court is convinced that § 10-29 is an "in lieu" tax. Monies raised from this tax are required to be returned to the airports to be used as deemed necessary by the local airport governing body.

Therefore, this Court holds that the tax provisions imposed upon the airlines serving South Dakota are permissible

pursuant to § 1513(d)(3). Consequently, this Court is not required to delve into the issue of whether this tax is burdensome or discriminatory, as the rest of § 1513(d) is not applicable. While the Court feels that § 10-29 is neither burdensome nor discriminatory, such a finding is not required to be made. § 10-29 meets the requirements of § 1513(d)(3). Therefore, this Court denies all of Plaintiffs' claims and holds that § 10-29 is an appropriate tax to be levied upon Plaintiffs.

Counsel for Department is directed to prepare findings of fact, conclusions of law and a judgment pursuant to the foregoing. The findings and conclusions shall specifically incorporate this opinion therein by reference.

Dated this 7th day of February, 1984.

By the Court:

/s/ ROBERT A. MILLER

ROBERT A. MILLER
Presiding Circuit Judge

ATTEST:

/s/ MARY I. ERICKSON
Clerk of Courts

By _____
Deputy

(SEAL)

APPENDIX C

Appeal No. 14560 — July 31, 1985

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA } ss:

Present: *Chief Justice* JON FOSHEIM and *Associate Justices* ROGER L. WOLLMAN, ROBERT E. MORGAN and FRANK E. HENDERSON and *Circuit Judge* GEORGE W. WUEST, acting as a Supreme Court Justice.

WESTERN AIR LINES, INCORPORATED,
a Corporation, *et al.*, *Plaintiffs and Appellants,*

v.

HUGHES COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS, *et al.*,
Defendants and Appellees.

This cause coming on to be heard on October 23, 1984, at a term of this Court at the Supreme Court Courtroom in the City of Spearfish, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment of the Circuit Court, within and for Hughes County, appealed from herein, be and the same is hereby affirmed,

AND IT IS FURTHER ORDERED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that Appellee have and recover of the Appellants costs on this appeal, taxed and allowed at Fifty and No/100 Dollars.

(SEAL)

By the Court:

/s/ JON FASHEIM
Chief Justice

ATTEST:

/s/ GLORIA C. ENGEL
Clerk of the Supreme Court

By _____
Deputy

APPENDIX D

IN THE

Supreme Court of the State of South Dakota

WESTERN AIR LINES, INC.,
a corporation, *et al.*,
Plaintiffs and Appellants,

v.

HUGHES COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS, *et al.*,
Defendants and Appellees.

Filed Oct. 9, 1985
Gloria C. Engel
Clerk
CASE NO. 14560

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appellants Western Air Lines, Inc., Republic Airlines, Inc., Ozark Air Lines, Inc. and Frontier Airlines, Inc. hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of South Dakota, affirming the judgment of the Circuit Court, entered in this case on July 31, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

RITER, MAYER, HOFER & RITER

By /s/ ROBERT C. RITER, JR.

Robert C. Riter, Jr.
319 S. Coteau Street
P. O. Box 280
Pierre, South Dakota
57501-0280
(605) 224-5825

Of Counsel:

ZUCKERT, SCOUTT, RASENBERGER & JOHNSON
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660

APPENDIX E-1
PARTIES BELOW

Plaintiff	Defendant	Circuit Court & Civil Case No.	
Western Airlines	Hughes County Treasurer	Sixth	83-157
	Hughes County Board of Commissioners	Sixth	83-222
	Pennington County Treasurer	Seventh	83-307
	Pennington County Board of Commissioners	Seventh	83-311
	Minnehana County Treasurer	Second	83-286
	Minnehaha County Board of Commissioners	Second	83-291
	State Board of Equalization	Seventh	83-343
	State Board of Equalization	Sixth	83-244
	State Board of Equalization	Second	83-320
Frontier Airlines	Pennington County Board of Commissioners	Seventh	83-310
	Pennington County Treasurer	Seventh	83-308
	Minnehaha County Board of Commissioners	Second	83-292
	Minnehaha County Treasurer	Second	83-287
	State Board of Equalization	Second	83-317
	State Board of Equalization	Seventh	83-341
Ozark Airlines	Minnehaha County Board of Commissioners	Second	83-290
	Minnehaha County Treasurer	Second	83-288
	State Board of Equalization	Second	83-318
Republic Airlines	Davison County Board of Commissioners	Fourth	83-284
	Davison County Treasurer	Fourth	83-283
	Hughes County Treasurer	Sixth	83-153
	Hughes County Board of Commissioners	Sixth	83-221

Plaintiff	Defendant	Circuit Court & Civil Case No.	
Republic Airlines	Codington County Board of Commissioners	Third	83-295
	Pennington County Board of Commissioners	Seventh	83-309
	Minnehaha County Board of Commissioners	Second	83-289
	Brown County Board of Commissioners	Fifth	83-278
	Yankton County Board of Commissioners	First	83-330
	Beadle County Board of Commissioners	Third	83-275
	Brookings County Board of Commissioners	Third	83-281
	Minnehaha County Treasurer	Second	83-285
	Brown County Treasurer	Fifth	83-277
	Yankton County Treasurer	First	83-329
	Beadle County Treasurer	Third	83-276
	Brookings County Treasurer	Third	83-282
	Pennington County Treasurer	Seventh	83-306
	Codington County Treasurer	Third	83-296
	State Board of Equalization	Second	83-319
	State Board of Equalization	Seventh	83-340
	State Board of Equalization	Fifth	83-326
	State Board of Equalization	Third	83-316
	State Board of Equalization	First	83-331
Continental Airlines	State Board of Equalization	Seventh	83-342

APPENDIX E-2

Airflight Property Taxes—1983

Airline	Value of Airflight property under S.D.C.L. 10-29-10	Assessed Value	Tax Assessed at average statewide mill rate (54.34)
Frontier	$1,579,442.00	740,758.00	$ 40,260.20
Republic	1,627,161.00	856,048.00	46,526.21
Western	2,762,008.00	1,432,772.00	77,871.16
Ozark	449,123.00	269,474.00	14,645.91
SUB TOTAL	$6,417,734.00	$3,299,052.00	$179,303.48
3 Others	501,819.00	278,771.00	15,151.20
TOTAL	$6,919,553.00	$3,577,823.00	$194,454.68

APPENDIX E-3

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Section 7(d) of the Airport Development Acceleration Act, of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C., § 1513(d), provides:

§ 1513. State taxation of air commerce

* * * *

(d) Acts which unreasonably burden and discriminate against interstate commerce: definitions

(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection—

(A) "Assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "Commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

B. Pertinent portions of Title 10, South Dakota Codified Laws provide:

10-4-6.1 Exemption from taxation of personal property not centrally assessed—Taxes or fees in lieu unimpaired. Personal property as defined in 10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax.

10-6-33. Basis for determining valuation for tax purposes—Forced sale value not to be used. All property shall be assessed at its true and full value in money but not more than sixty percent of such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made and applied and the taxes computed. * * *

10-6-34.1 Centrally assessed property classified Percentage of value at which equalized. Centrally assessed property is hereby classified for purposes of ad valorem taxation and shall be assessed and equalized as real and

personal property in the same proportion as was established in the respective taxing districts in the year 1977. Centrally assessed personal property shall be equalized at a percentage which is not greater than one hundred twenty-five percent of the percentage at which centrally assessed personal property was equalized at the same percentage as other real property in the county.

10-29-2. Department of revenue to assess flight property. Flight property of airline companies operating in this state shall be assessed by the department of revenue and not otherwise.

10-29-8. Annual assessment of flight property Information considered—Addition of omitted property. The department of revenue shall assess annually on the fifth day of July of each year all flight property of airline companies serving the state. In making such assessment, the department of revenue shall consider all the reports, facts, and information filed, with any other information obtainable, concerning the value of the flight property of airline companies and may add any property omitted from the return of such companies.

C. The Supremacy Clause of the United States Constitution (Art. VI, Clause 2) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.